O/A 5-7-85

IN THE SUPREME COURT OF FLORIDA

E. N., a child, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 65,977

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PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

E. N., a child, Petitioner, vs STATE OF FLORIDA, Respondent.	)	CASE NO. 65,977

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

The Petitioner, E. N., a child, was the juvenile Defendant in the trial court and the Appellee in the Fifth District Court of Appeal.

Respondent is the State of Florida which was the Prosecutor in the trial court and the Appellant in the Fifth District Court of Appeal.

In this brief the parties will be referred to as Petitioner or E. N., and the State.

The following symbols will be used:

"R" - Record on Appeal

"A" - Appendix

STATEMENT OF THE CASE AND FACTS

On September 9, 1983, the State filed a petition in the Circuit Court for Orange County charging E. N., a child, with delinquency and alleging that he entered or remained upon the campus of Grand Avenue School in Orange County, Florida, in violation of Section 228.091(1), Florida Statutes (Supp. 1982). E. N. filed a motion to dismiss the delinquency charge alleging, without contest, that he was an enrolled student at Memorial Junior High, an Orange County public school (R13-14). On October 17, 1983, the Honorable R. James Stroker, Circuit Judge, granted the motion on the grounds that E. N. was a student of a public school and that the applicability of Section 228.091(1) to public school students was ambiguous (R7-8).

The State appealed to the Fifth District Court of Appeal (R16). On September 13, 1984, the District Court of Appeal, by a two-to-one vote, reversed the trial court's order of dismissal, finding that the Legislature intended to exempt only public school students who are enrolled in the particular school which is entered. State v. E. N., 455 So.2d 636 (Fla. 5th DCA 1984)(A-1). Judge Cowart in his dissent observed that the statute's applicability to public school students was ambiguous and that the majority had failed to apply the correct rule of law that penal statutes must be construed strictly and any ambiguity resolved in favor of the accused. Id.

Petitioner filed a timely Notice to Invoke Discretionary Review on October 4, 1984. This Court accepted jurisdiction on January 23, 1985.

SUMMARY OF ARGUMENTS

POINT I

Section 228.091(1)(a)1. excludes from prosecution under the statute "students ... of a public school". This exclusion is capable of being read to cover a person such as E. N., who is a "student" of "a public school", but not enrolled at the particular school which is entered. On the other hand, it may be read in a narrower sense to exempt only students enrolled at the particular school entered. The rule that penal statutes, where ambiguous, must be strictly construed in favor of the accused requires that the construction favorable to Petitioner be adopted.

Furthermore, the language of Section 228.091(1) is so vague, ambiguous, and uncertain that it fails to provide sufficient notice as to what conduct is prohibited and what groups of persons are subject to prosecution. The statutory language draws an uncertain line between criminal conduct and activities which the ordinary person would consider wholly innocent. The statute is unconstitutional on its face and should be struck down as violative of the due process clauses of the United States and Florida constitutions.

POINT II

Based on the arguments presented by the Petitioner in J. P. W. v. State, (Sup.Ct. Case No. 63,981), the State has no right to appeal final judgments in juvenile cases.

ARGUMENTS

POINT I

THE APPLICABILITY OF SECTION 228.091(1), FLORIDA STATUTES, TO THE PETITIONER IS AMBIGUOUS AND, AS SUCH, MUST BE CONSTRUED IN ACCORDANCE WITH THE MEANING MOST FAVORABLE TO THE PETITIONER; MOREOVER, SAID STATUTE IS UNCONSTITUTIONALLY VAGUE ON ITS FACE, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

This case presents a question dealing with the interpretation of Section 228.091(1), Florida Statutes (Supp.1982), entitled Trespass Upon Grounds or Facilities of Public Schools, which provides as follows:

> (1) Any person who:
> (a)1. Is not a student, officer, or employee of a public school;
> 2. Does not have legitimate business on the campus or any other authorization, license, or invitation to enter or remain upon school property; or
> 3. Is not a parent, guardian, or person who has legal custody of a student enrolled at such school; or
> (b)1. Is a student currently under suspension or expulsion; or
> 2. Is an employee who is not required by his employment by such school to be on the campus or any other facility owned, operated, or controlled by the governing board of such school and who has no lawful purpose to be on such premises;
>
> and who enters or remains upon the campus or any other facility owned by any such school commits a trespass upon the grounds of a public school facility and is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s.775.084.

(emphasis supplied). Although this statute was passed in 1968, it does not appear that it has previously been examined by any Florida appellate court.

The analysis in the instant case should begin with the fundamental rule of statutory construction that penal statutes are to be construed strictly to insure that no person is convicted unless "a fair warning [has first been] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed". McBoyle v. United States, 283 U.S. 25,27, 75 L.Ed. 816,818, 51 S.Ct. 340 (1931).

> This rule is founded on the principles of fairness and justice, that a person is entitled to clear notice of what acts are proscribed and is therefore given the benefit of the doubt when the criminal statute is ambiguous. Applying the rule that criminal statutes must be strictly construed, nothing not clearly and intelligently described in a statute's very words, ... shall be considered included within its terms.

Ferguson v. State, 377 So.2d 709,711 (Fla. 1979). The accused must be plainly and unmistakably placed within the criminal statute and all reasonable doubts resolved in his favor. Nell v. State, 277 So.2d 1,4 (Fla. 1973). A penal statute which is couched in language so vague or ambiguous that persons of common intelligence must guess at its meaning and differ as to its application violates the due process clauses of the United States and Florida Constitutions and is void for vagueness. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); State v. Gray, 935 So.2d 816 (Fla. 1983);

Scullock v. State, 377 So.2d 682 (Fla. 1979).

Subparagraphs (1)(a)1., (1)(a)2., and (1)(a)3. of Section 228.091 create three discrete categories of persons who are immune from prosecution under the statute. Subparagraphs (1)(a)1. excludes students, officers, or employees "of a public school"; subparagraph (1)(a)2. excepts persons with "legitimate business on the campus or any other authorization, license, or invitation to enter"; and subparagraph (1)(a)3. excludes parents and guardians of "student[s] enrolled at such school". No language is used in subparagraph (1)(a)1. to limit or qualify "public school". The adjective "a", commonly referred to as the indefinite article because it does not define any particular person or thing, immediately precedes the term "public school" in subparagraph (1)(a)1. The article "a" commonly denotes "one" or "any". WEBSTER'S NEW WORLD DICTIONARY (1966); BLACK'S LAW DICTIONARY (Rev. 4th Ed. 1968).

The trial judge and Judge Cowart in his dissent recognized that the class of persons excluded by the language of subparagraph (1)(a)1. was ambiguous. As a "student" of "a public school", E. N. fell within the category of persons excluded by the language of (1)(a)1. On the other hand, the subparagraph might be read narrowly to exempt only students enrolled at the particular school which is entered. Thus, the trial judge applied the rule that ambiguous penal statutes must be construed strictly in favor of the accused. Despite the language of (1)(a)1., the Fifth District reversed on the grounds that it thought that the Legislature intended to exclude only students

enrolled at the particular school entered. However, as noted by the dissenting opinion:

> [T]he legal point is not which of the two meanings was intended by the legislature. This is not one of the more common situations where a court properly construes an ambiguous statute to determine the true intent of the legislature. This is a penal statute. The correct and applicable rule of law is that penal statutes must be strictly construed and any ambiguity resolved in favor of the accused. When a criminal statute is ambiguous, and under one meaning it applies to the defendant or his conduct and under the other meaning it does not, the proper resolution of the legal problem is not for the appellate court to construe or interpret the statute and explain the rationale for its adoption of the second, more harsh, meaning but to declare the statute to be ambiguous and hold that, for that reason alone, the statute must be applied in accordance with the meaning most favorable to the accused.

E. N., supra at 638 (Cowart, J., dissenting)(footnotes omitted). The general principle that laws should be construed to effectuate the Legislature's intent must be applied in conjunction with the due process requirement that a citizen receive clear notice that he or his conduct falls within a criminal statute. If the Legislature intended by subparagraph (1)(a)1. to exclude only students enrolled at the particular public school which is entered, then it should have unequivocally said so in terms persons of ordinary intelligence can understand. Limiting language such as that used in subparagraph (1)(a)3. or such as "is not a student enrolled in the public school which is entered" should have been utilized if

the narrower interpretation of (1)(a)1. was desired, instead of the broader language which the Legislature actually chose to use, i.e., "is not a student ... of a public school". Petitioner submits that the construction accorded the statute by the Fifth District Court of Appeal renders it void for vagueness.

Basketball courts, baseball diamonds, football fields, and playground equipment are located on public school grounds. Unless posted "no trespassing" or fenced and locked, public school grounds have served as neighborhood recreational areas, and school children, whether enrolled at the particular school or not, have been free to play on the grounds after school hours and on week-ends. Thus, the exception for school students in (1)(a) 1. is not without reasonable basis.

Irrespective of Section 228.091(1), the State would be free to prosecute a public school student under the general trespass statute, Section 810.08, Florida Statutes, for entering public school grounds though it appears that the State would be required to show that the act was committed after warning either by actual communication, posting, etc. See Downer v. State, 375 So.2d 840 (Fla. 1979); Corn v. State, 332 So.2d 4 (Fla. 1976). The dissenting opinion in the instant case pointed out that usually trespasses to land are not made criminal unless committed after at least one warning or for some specific wrongful purpose. Section 228.091(1), however, requires no warning. Apparently, all that is necessary for a violation is an entry by a person not included within any of the exempted classes. In the instant case the petition alleged only that E. N. entered the campus of Grand

Avenue School (R10). The record contains no evidence that E. N. caused a disturbance or engaged in any other culpable conduct when he entered the school grounds.

In addition to failing to clearly delineate the group of persons who are immune from prosecution by subparagraph (1)(a)1., Section 228.091 is vague and uncertain in many other details so as to be constitutionally infirm on its face. For example, can it be said that the average person is on fair notice as to what constitutes "legitimate business", within the meaning of subparagraph (1)(a)2? The common meaning of "business" is "one's work; occupation; profession". WEBSTER'S NEW WORLD DICTIONARY (1966). Black defines it as "employment, occupation, profession, or commercial activity engaged in for gain or livelihood". BLACK'S LAW DICTIONARY 179 (5th Ed. 1979). Does a person who enters a public schoolyard after school hours for the purpose of using the basketball court, an act surely regarded by modern standards as wholly innocent, risk violating this statute?

The United States Supreme Court in Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), struck down a law prohibiting loitering because it failed to provide sufficient notice of the prohibited conduct and encouraged arbitrary and erratic enforcement by prosecuting officials. The Court found that the law's proscription of activities such as "wandering or strolling around from place to place without any lawful purpose or object" criminalizes "activities which by modern [societal] standards are normally innocent". Further-

more, the Court noted that the qualification "without any lawful purpose or object" may be "a trap for innocent acts". Papachristou, supra at 164-165.

The courts in several sister states have struck down school loitering and trespass statutes, similar in many respects to Section 228.091(1), as unconstitutional on vagueness and other grounds. See People in Interest of M., 630 P.2d 593 (Colo.1981); State v. Martinez, 85 Wash. 2d 671, 538 P.2d 521 (Wash.1975); State v. Debnam, 542 P.2d 940 (Or.App.1975); Smith v. Sheeter, 402 F.Supp. 624 (DC Ohio 1975) (See A-2 through A-5). In People in Interest of M., supra, the law in question prohibited "loiter-[ing] in or about a school building or grounds, not having any reason or relationship involving custody of, or responsibility for, a pupil or any other specific, legitimate reason for being there ..." and defined "loitering" as lingering, delaying, wandering or remaining in or about school grounds. The Supreme Court of Colorado recognized that numerous uncertainties existed in the statutory language, one of which was the term "specific, legitimate reason". With respect to this limiting term, the Court observed:

> The inclusion of such an open-ended element as a qualification of criminal conduct well might be "a trap for innocent acts", Papachristou, supra 405 U.S. at 164, 92 S.Ct. at 844, 31 L.Ed.2d at 116.
>
> * * * * *
>
> One need not resort to bizarre or extreme examples to underscore the infirmity in [the] statutory proscription ... The statute prohibits lin-

> gering, delaying, wandering or remaining in or about school grounds. A parent "lingering" in the playground facilities of the school with his or her pre-school infant, a teenager "delaying" on the grounds in order to walk home with a student friend who shortly will leave the school building, an adult "wandering" near the school grounds for an evening walk, a youth "remaining" on the school grounds during a weekend afternoon to make use of an outdoor basketball court - none of these persons can claim with reasonable assurance that their conduct is not included within the broad sweep of the statutory prohibition. Statutory language which strikes such an amorphous and uncertain line of demarcation between criminal conduct and what the ordinary person would consider normal and legitimate behavior cannot survive a constitutional challenge under the Due Process Clause of the federal and state constitutions.

These same problems are present with the qualifier "legitimate business" in Section 228.091(1), Florida Statutes. The statute under scrutiny in State v. Martinez, supra, prohibited persons "except a person enrolled as a student in or parents or guardian of such students or person employed by such school" from willfully loitering about school buildings "without a lawful purpose". Finding that the term "without a lawful purpose" was insufficient to apprise the ordinary citizen of what conduct was proscribed, the Supreme Court of Washington struck the law as unconstitutionally vague[1/].

1/ In addition, the Court found that the classification scheme established in the statute (i.e. the class of persons immune from prosecution and the class of persons subject to prosecution) violated equal protection.

As Judge Cowart observed, Section 228.091(1) is "vague, confusing, ambiguous, and overbroad", and this is "doubtless one of the most poorly worded of any Florida criminal statute". _E. N._, _supra_ at 638. Like the laws struck down in _Papachristou_, _People in Interest of M._, and _Martinez_, Section 228.091(1) cannot pass constitutional muster and should be given a similar fate.

POINT II

THE PROVISIONS OF ARTICLE V, SECTION 4(b)(1) OF THE FLORIDA CONSTITUTION ARE NOT SELF-EXECUTING SO AS TO AFFORD THE STATE THE RIGHT TO APPEAL FROM A FINAL JUDGMENT IN A JUVENILE PROCEEDING.

As his argument under this point, E. N. hereby adopts the arguments made by the Petitioner in J. P. W. v. State, (Sup. Ct. Case No. 63,981), attached hereto (See A-6).

CONCLUSION

BASED UPON the foregoing arguments and authorities, the Petitioner respectfully requests as to Point I, that this Honorable Court reverse the decision of the Fifth District Court of Appeal of the State of Florida. As to Point II, the Petitioner requests that this Honorable Court quash the State appeal in this cause and decline to treat the Notice of Appeal as a Petition for Writ of Certiorari.

Respectfully submitted,

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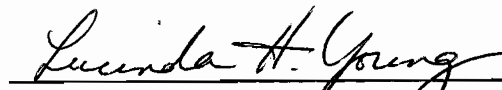
CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to E. S. N., a child, 602 20th Street, Orlando, Florida 32805, on this 12th day of February, 1985.



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